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Supreme Court of the United States

OCTOBER TERM, 1949

No. .....

L. HOLMES ELEAZER, PETITIONER,

versus

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, L. Holmes Eleazer, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this cause on November 7, 1949, reversing the judgment of the United States District Court for the Eastern District of South Carolina entered on January 29, 1949, in favor of petitioner, and directing the District Court to enter judgment for the United States.

STATEMENT OF MATTERS INVOLVED

Petitioner, suing the United States under the authority of the Federal Tort Claims Act (60 Stat. 842, 28 USC 921, et seq., codified since this case arose into separated sections of new Title 28 USC), was awarded in the District Court a judgment for $30,000.00 in compensation for serious bodily injuries suffered by him as a result of the negligent operation of an automobile by Lieutenant James B. Talley of the United States Marine Corps upon a highway in North Carolina on August 20, 1946. Upon appeal by the United States, the Court of Appeals reversed the judgment and directed the entry of judgment for the United States, holding (1) that Lt. Talley was not, at the time and place of his admittedly negligent driving, acting within the scope of his employment by the Marine Corps; and (2) that it was not sufficient to show that he was acting within the line of his military duty as a Marine Corps officer.

The finding of no "scope of employment" was made by the Court of Appeals, despite the fact that Lt. Talley was, at the time of his collision with the petitioner, performing travel under an official written order of the Marine Corps directing him to proceed from the Marine Station at Cherry Point, N. C., to the station at Corpus Christi, Texas, for military duty there, the order stating that the travel directed was "necessary in the public service" and obligating the Government, under 17 USC 112, to pay for the travel performed on a most direct mileage basis, and the collision occurring a few miles outside of Cherry Point on the most direct route to Corpus Christi.

The Court of Appeals based its conclusion upon the ground that because the Lieutenant had the privilege of performing this travel in his own automobile and could, under the order, later stop at his home in Atlanta, Georgia, before completing the ordered travel to Corpus Christi, the Government lacked the control over his conduct which is requisite to a *respondeat superior* recovery.

The Court's finding that it was not sufficient for petitioner's recovery to prove that Lieutenant Talley was acting within his "line of duty" was made despite the fact that Congress in Section 402 (c) of the Federal Tort Claims Act (28 USC 941) provided that: "'Acting within the scope of his office or employment,' in the case of a member of the military or naval forces of the United States, means acting in line of duty."

If we correctly interpret the opinion below it will bar any recovery against the United States for injuries inflicted by a Government agent traveling on the Government's business if he is driving a privately owned automobile. Certainly it will bar recovery (for that is the case at bar) if such agent purposes to break his official travel by stopping at a way station for personal reasons, even though his negligent injury of a third person occurs before such break and on the direct route of the ordered travel.

This decision so "substantially affects the area of private suit against the Government" [1] that this Court is asked to review it.

QUESTIONS PRESENTED

1. Was it error for the Court of Appeals to hold that the Government was so lacking in control over travel being performed by the Marine officer in his own automobile as to take the travel, although ordered at Government expense, out of the scope of his employment?

2. Was it error for the Court of Appeals to hold that the fact that the Marine Officer intended to suspend his official travel at Atlanta in order to enjoy a few days of leave there took the travel, while being performed on the most direct route between the terminal points, out of the scope of his employment?

3. Was it error for the Court of Appeals to refuse to give effect to the express provision by Congress in the Tort Claims

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[1] *United States of America v. Spelar*, Cert. granted 336 U. S. 950; Opinion, ——U. S.——, 18 L. W. 4012.

Act that there is a sufficient showing of scope of employment on the part of a member of the armed forces when it is established that he is acting within his line of duty?

STATEMENT OF JURISDICTION

This Court has jurisdiction to consider and grant this petition under Title 28 USC, Section 1254.

The judgment of the Court below was entered November 7, 1949. An order was entered by the Court below on December 2, 1949, staying its mandate provided an application for a Writ of Certiorari be filed in this Court within thirty days from that date.

SPECIFICATION OF ERRORS

The Court of Appeals erred:

1. In reversing the judgment of the District Court.

2. In holding that the Marine Officer who negligently injured the petitioner was not acting at the time within the scope of his employment by the United States.

3. In deciding questions of substantive agency law not in conformity with the law of the state where the negligent act occurred as required by the Tort Claims Act. (28 USC 941.)

4. In refusing to give effect to the Congressional enactment that "acting within the scope of employment" in the case of a member of the military or naval forces of the United States means "acting in line of duty," and to apply the long established administrative construction of "line of duty" to the status of the Marine officer at the time and place of his negligent conduct.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The decision of the Court of Appeals that the Government is not liable under the Federal Tort Claims Act for the negligent performance of travel orders by an agent of the Government traveling in his own automobile is a fundamental

decision affecting the scope of an important Federal Statute which has not been, but should be, settled by this Court.

2. The decision of the Court of Appeals that the Government is not liable under the Federal Tort Claims Act for the negligent performance of travel orders by an agent of the Government when the agent, although not departing from the direct route of the ordered travel, plans to stop *en route* on personal business is a fundamental decision affecting the scope of an important Federal Statute which has not, but should be, settled by this Court.

3. The decision of the Court of Appeals that the Marine Officer was not acting within the scope of his employment with the Government because he was driving his own automobile or because he planned to later interrupt his official travel by spending a few days of leave at home is a decision of an important question of the substantive law of North Carolina probably in conflict with applicable North Carolina decisions; *Pinnix v. Griffin,* 219 N.C. 35, 12 S.E. (2d) 667; *Lassiter v. Cline,* 222 N.C. 271, 22 S.E. (2d) 558; *Parrott v. Kantor,* 216 N.C. 584, 6 S.E. (2d) 40, and therefore in conflict with the Federal Tort Claims Act.

4. The decision of the Court of Appeals that Congress did not prescribe a more liberal *respondeat superior* standard for military personnel than for other Government employees is a decision as to the constuction of an important Federal Statute which has not been, but should be, settled by this Court.

5. The decision of the Court of Appeals that Congress did not prescribe a more liberal *respondeat superior* standard for military personnel than for other Government employees is a decision disregarding the clear language of the Statute and is therefore probably in conflict with applicable decisions of this Court. *Brooks v. United States,* .... U.S. ...., 93 L.Ed. 884; *Hellmich v. Hellman,* 276 U.S. 233; *Stairs v. Peaslee,* 59 U.S. 521.

WHEREFORE, your petitioner prays that this Court issue its Writ of Certiorari to the United States Court of

Appeals for the Fourth Circuit to review the judgment of that Court herein; that the judgment of that Court be reversed; and for such further relief as to this Court may seem proper.

Respectfully submitted,

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BLATT & FALES,
Attorneys for Petitioner.

December 30, 1949

Supreme Court of the United States

OCTOBER TERM, 1949

No. .....

L. HOLMES ELEAZER, PETITIONER,

versus

UNITED STATES OF AMERICA, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

A summary of the matters involved in this application, a statement of this Court's jurisdiction, and a specification of errors in the Court below all appear sufficiently in the Petition to which this brief is appended.

Petitioner's brief is framed in three sections pointing to substantial error in each of three principal conclusions by the Court of Appeals which may be summarized (probably in the order of importance) as follows: (1) The Marine Officer, if acting for the Government in performing his travel, was acting as an independent contractor, with the Government having no right to control his operation of his automobile. (2) The Marine Officer was actually not serving the Government in performing the travel but was instead fulfilling his own purposes by going home on leave. (3) Even though he was in line of duty in the military sense, Congress did not intend, despite the language of Section 402(c) of

the Tort Claims Act, to allow recovery against the Government on that ground.

I.

The Marine Officer was not Independent of Government Control

The whole of the opinion below is built upon the premise that the Government had no right to control the operation of the Marine Officer's private automobile in complying with his change-of-station order. The conclusion is therefore drawn that the officer was not acting as a servant of the Government at all, but rather as an independent contractor for whose acts the employer is not responsible.

The authorities support the general proposition that a right of control is requisite in every master-servant relationship. That has always been an axiom of agency law; but it has always been an admittedly theoretical concept, and the courts, never requiring that right of control be established as an independent fact, have found the relationship in a myriad of subsidiary circumstances. The *Restatement of the Law of Agency,* Section 220, in discussing the right of control test as distinguishing a servant from an independent contractor, can do no more than list numerous factual considerations which may throw light upon the final determination of that issue.

Different courts are prone to emphasize different facts in deciding whether an employer can be said to have sufficient right of control over an employee to make the employee a servant with resulting *respondeat superior* liability against the master. The North Carolina decisions, which the Court was obligated to follow in the present case, are committed to the rule that the "right to fire" is virtually conclusive proof of a master-servant relationship. *Lassiter v. Cline,* 222 N.C. 271, 22 S.E. (2d) 558, in which the Court said:

> Certainly the "right to fire" is one of the most effective methods of control, and this power the defendants' witness testified he possessed over Thomas the driver

of the colliding truck; and this irrespective of whether the truck belonged to Thomas or to the defendant. Chief Justice Clerk in *Evans v. Lumber Co.*, 174 N.C. 31, 93 S.E. 430, 431, 30 A.L.R. 1498, thus states the law in this jurisdiction: "In this case the employer had power to terminate Spruill's employment at any time. This gave the defendant potential control over him, and is conclusive that Spruill was not an independent contractor, for whose negligence the defendant was not responsible."

Had the Court applied this law it could not have reached the conclusion that the Marine Corps had no right of control over its Officer while performing travel under official orders. Nor could it have so decided if it had considered the basic relationship between a person in the armed forces and his military superiors. This Marine Officer owed at all times an exclusive and unqualified allegiance to his superior officers and was subject to their command at every moment until his separation from the service. *Articles for the Government of the Navy*, Art. 4, 34 USC 1200.

His commanding officer could have revoked his change-of-station orders at any time; could have directed him to go to any other place by another route; and had he been present, could have controlled the physical details of the performance of the travel order. Unlike a civilian employee of the Government, the officer could not quit his employment rather than obey the order. It was military compulsion, the strongest possible "right of control," which sent him from North Carolina to Texas.

Even in ordinary industrial employment, where this unique and absolute control of a military subordinate is not present, there are cases holding (with none found to the contrary) that an employer is liable under *respondeat superior* principles for the negligent operation by an employee of his own automobile being used to accomplish an order by the employer that he change the headquarters of his work from one city to another.

Such a civilian "change-of-station" case is the Virginia decision of *Barber v. Textile Machine Works*, 178 Va. 435, 17

S.E. (2d) 359. In that case an employee of the defendant named Ammann had been engaged in installing certain machinery in Tennessee. Completing this work, he wired the defendant's office in Pennsylvania for instructions and was directed to report there and await further orders. Ammann's hourly wages covered the time spent in traveling and in addition he received traveling expenses based upon the railroad fare between terminal points. The defendant had not authorized the use of his automobile in making these changes, but there was evidence that it knew some of its employees used their own cars and that it had some indication that Ammann used his. Upon these facts, the Court upheld the liability of the employer, saying:

> Under the facts of the instant case, we find that Ammann, an agent of the Textile Machine Works, had implied authority to operate his own automobile in the business of the Company. Furthermore, the company had at least potential control over the operation of his car, inasmuch as he was being paid a salary while traveling and was subject to the control of the company as to where and when he should go. He was also acting within the scope of his employment at the time of the collision when he was returning to Pennsylvania in compliance with the instructions of the defendant company.

No North Carolina decision has been found involving just this situation, but the Supreme Court of North Carolina has held in *Tomlinson v. Sharpe,* 226 N.C. 177, 37 S.Ed. (2d) 498, that its application of *respondeat superior* principles is the same as that of the Virginia courts.

On all fours with the *Barber case* is *Webster v. Mountain States Tel. & Tel. Co.,* 108 Mont. 188, 89 P. (2d) 602; and the holding in such cases has support in many decisions involving comparable situations: Where the employee is directed to attend a convention and return (Cf. *Long v. McKay,* 295 Mich. 494, 295 N. W. 239), and where the employee in his business must spend nights away from home and drives his automobile to towns convenient for that purpose (Cf. *Adams v. Power Co.,* 200 S.C. 438, 21 S.E. (2d) 17).

The theory of the Court below as to right of control would apparently bar any recovery against the Government when a Government employee is using his own automobile to perform ordered travel. That is in direct conflict with the North Carolina decisions, for recovery is allowed against an employer for injuries inflicted by an employee driving his own automobile when the facts gave rise to an inference that the employee was, at least in part, furthering the employer's business and had the employer's permission, express or implied, to use his own automobile: *Pinnix v. Griffin,* 219 N.C. 35, 12 S.E. (2d) 667; *Barrow v. Keel,* 213 N.C. 375, 196 S.E. 366; *Davidson v. Western Union* 207 N.C. 790, 178 S.E. 603; *Miller v. Wood,* 210 N.C. 520, 187 S.E. 765.

That the ownership of the automobile is of no importance when service is being performed for the master was recognized in an earlier decision of the Court below, *P. F. Collier & Son Distributing Corp. v. Drinkwater,* 4 Cir., 81 F. (2d) 200. The Court in that case denied recovery because the employee had completely finished his employer's business and was driving home for a week-end when the collision occurred. It should be noted, however, in connection with the fact that the Marine Officer here was to receive mileage for the travel he was performing when he injured the petitioner, that Judge Parker's opinion in the *Drinkwater case* emphasized the fact that the employer, although obligated to pay the employee mileage between cities on his business route, did not pay him mileage when he went home on weekends. The opinion states that "if the automobile were being used for carrying Long to his home, as an incident in the carrying on of the employer's business, the employer would be liable for negligence in its operation."

That Court has, in earlier decisions, stood among the most liberal in finding right of control and therefore a master-servant relationship as against a claim of independent contractor. In the leading case of *Gulf Refining Co. v. Brown,* 4 Cir., 93 F. (2d) 870, 116 ALR 449, it was held that *respondeat superior* liability existed against the oil company for the delicts of the employees of a local distributor who was made

under his contract with the oil company as independent as language could make him.

It would seem that because this is a suit against the Government the court below has applied different principles than those it would have applied, under its own precedents or those of the North Carolina Court, to the case of a private employer. This is in contradiction of the express purpose of Congress to make the Government responsible in all cases "where a private person would be liable * * * in accordance with the law of the place where the act or omission occurred." (28 USC 941.)

This Court in *United States v. Aetna Casualty & Surety Co.*, December 12, 1949, ... U.S. ...., 18 L.W. 4060, 4064, settled against the Government its contention, made frequently in the lower Federal Courts, that the Tort Claims Act must be strictly construed because it waives sovereign immunity.

The whole purpose of the Tort Claims Act is to provide recompense for injuries done to innocent persons through negligent performance of public service by employees of the Government. The order which the Marine Officer here had received (R. 46) specified that the travel which it enjoined was "necessary in the public service." He was authorized to use his own automobile in performing the ordered travel (B. 44) with the Government paying him for the travel on the basis of eight cents per mile over the most direct route. He was under a military duty to make the trip and remained throughout the trip under the control of his military superiors. It was the actual performance of the ordered travel which injured the petitioner. Under these circumstances, the broad remedial purposes of the Tort Claims Act would be thwarted if the injured party is left without a remedy.

II.

The Travel was on Government Business

The conclusion of the Court below that the Marine Officer was not performing ordered travel when he injured

the petitioner but was going home on leave is rested upon the fact that in a statement given after the collision (R. 39) he stated that he departed from his Cherry Point station on August 20 "en route to my home in Atlanta, Ga., where I intended staying until such time as was necessary for me to proceed in order to report to my next duty station in accordance with my orders." In another written statement (Exhibit 13 in the original record but not printed in the Court below) he stated that he also intended to stop in Raleigh, N.C. to leave his sister who had been with him at Cherry Point. However, both statements are clear that, despite his purpose to stop over at these two points, he was principally motivated by a purpose to accomplish in his own automobile the ordered travel from Cherry Point, N. C., to Corpus Christi, Texas. The Government stipulated (R. 38) that "at the time of the collision, Lt. James B. Talley was acting pursuant to orders contained in 'Bases Transfer Order No. 1041-1946', * * *."

It is true that if the collision had not occurred a few miles west of Cherry Point and the Lieutenant had encountered no delaying factors, the fact that he did not have to report at Corpus Christi, Texas, until ten days after his departure from Cherry Point would have permitted him to enjoy a few days of leave at his home in Atlanta. This potential leave, however, had certainly not commenced at the time of the collision on August 20, when the actual travel was being performed and the officer was still on the most direct route from Cherry Point, N.C. to Corpus Christi, Texas (R. 23, 71).

It is universally recognized that if a servant is acting in part for his master's purposes and in part for his own, the master is responsible for his tortuous acts under *respondeat superior* principles. The *Restatement of the Law of Agency* says (Section 236): "An act may be within the scope of employment, although done in part to serve the purposes of the servant or of a third person." Comment (b) under this section is as follows:

> The fact that the predominant motive of the servant is to benefit himself or a third person does not prevent

> the act from being within the scope of employment. If the purpose of serving the master's business actuates the servant to any appreciable extent, the master is subject to liability if the act otherwise is within the service, as where the servant drives rapidly, partly to deliver his master's goods, but chiefly in order that he may terminate his day's work or to return the vehicle to the master's premises. So also, the act may be found to be in the service where not only the manner of acting but the act itself is done largely for the servant's purposes. Thus, where the servant desires to make a brief detour of his own and for the purpose of expediting such trip places the employer's goods by the roadside, intending to pick them up later, the act of so placing them may be found to be within the scope of employment.

The North Carolina decisions agree that the acts of a servant are taken out of the scope of his employment only when they are **wholly** for his own purposes. *Parrott v. Kantor,* 216 N.C. 584, 6 S.E. (2d) 40; *Buckner v. Railroad Co.,* 157 N.C. 443, 73 S.E. 137; *Rogers v. Black Mountain,* 224 N.C. 119, 29 S.E. (2d), 203; *Linville v. Nissen,* 162 N.C. 95, 77 S.E. 1096; *Smith v. Moore,* 220 N.C. 165, 16 S.E. (2d) 701.

In the *Parrott case,* supra, the Court held that if a servant sent to deliver passengers at a town seventy miles away and return the automobile, had selected a return route which would permit him to stop for a visit with his parents, the master would still be liable for the negligent operation of the automobile on the route which went by the parents' home.

Similarly, it has been frequently said that an unfulfilled purpose to deviate from the master's business will not take a servant's act out of the scope of his employment. *Clawson v. Pearce-Arrow Motor Car Co.,* 231 N.Y. 273, 131 N.E. 914; *Elliott-Trant Motor Corp. v. Brennan,* 161 Va. 140, 170 S.E. 601; *Carroll v. Beard-Laney,* 207 S.C. 339, 35 S.E. (2d) 425.

From Justice Cardozo's opinion in the *Clawson case,* supra:

> The driver of the car was engaged in the defendant's business in taking it after the day's work to a place of

storage for the night. He did not abandon the business merely because at the same time that he was attending to it he served some other purpose. * * * The unfulfilled intention of passing the repair shop and returning did not transform the trip in its entirety, and vitiate that part of the service which was legitimate and useful.

From *Pinnix v. Griffin*, 219 N.C. 35, 12 S.E. (2d) 609:

Where the actual employment is admitted, courts should be slow to assume that there has been any deviation from the course of employment upon speculative hypotheses.

These principles were disregarded by the Court below when it held that the intention of the Marine officer to enjoy a few days of leave in Atlanta made the whole of his travel from Cherry Point to Corpus Christi a personal matter rather than a compliance with the order he had received.

III.

The Proper Test is "Line of Duty"

The Court overruled the District Court's conclusion that Congress, in the Tort Claims Act, had prescribed a separate scope of employment test for members of the armed forces—whether they were at the time acting within their "line of duty" as that expression is used in the military establishment.

The District Court based its conclusion upon the clear language of the statute, for Congress provided without qualification in Section 402 (c) of the Act (28 USC 931) that:

"Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States, means acting in line of duty.

When Congress thus went out of its way to use the term of art "line of duty" in defining what acts of a military person will subject the Government to *respondeat superior* liability, it must have intended to make a distinction between those acts and the acts of a civilian employee which will create Governmental liability, and the intended distinction

may be given effect only by construing "line of duty" as it has been construed for many years, and necessarily with Congress' knowledge, by the administrative and judicial branches of the Government.

There is no purpose for, or meaning to, Section 402 (c) of the Act if it is not a declaration by Congress that scope of employment is established in the case of a soldier or sailor by a showing that he was acting at the time in his line of duty. The suggestion of the Court of Appeals that Section 402 (c) was enacted merely to give a more apt description of what a soldier or sailor does within the scope of his employment, without at all liberalizing that concept, is an unsound conjecture. If no legal distinction had been intended, Congress would never have opened the door to an argument that a distinction was intended, simply to make a meaningless comparison. Wise or unwise, the Tort Claims Act must be construed as Congress wrote it. *Brooks v. United States*, ... U.S. ...., 93 L.Ed. 884.

There can be no doubt that if "line of duty" is given in Section 402 (c) its fixed administrative interpretation, the Government is liable for the negligence of the Marine Lieutenant here even if he be considered as on leave at the time of the collision. The District Court thus defined "line of duty" (R. 55) and the Court of Appeals does not question the finding:

> The uniform interpretation of the phase "acting in line of duty," as used in the cited statutes, has been that a serviceman would be regarded as acting in line of duty, if at a place required or permitted by his duty and doing something required or permitted by his duty. Of course, he would not be regarded as so acting, if doing something contrary to his duty and acting independently of it, purely in the furtherance of his private business or pleasure.

That this is an accurate paraphrase of the modern definition of "line of duty" as followed by the administrative agencies charged with interpreting and applying other statutes which make benefits depend upon a line of duty find-

ing is absolutely clear. 32 *Op. Atty. Gen.* 12; *Army Regulations,* 345-415, 23 November 1933; *Army Regulations,* 40-1025, 12 October 1940; *Digest of Opinions of the Judge Advocate General of the Army,* 1912-1940, page 952, et seq.; *Compilation of Navy Court-Martial Orders,* 1916-1937, pp. 11, 15, 16, 20; *Veterans Regulation No.* 10, Section VIII, 38 USCA, Ch. 12, p. 669. Judicial decisions are also in accord: *Moore v. U.S.,* 48 Ct. Cl. 110; *Globe Indemnity Co. v. Forrest,* 165 Va. 267, 182 S.E. 25; *Doke v. United Pac. Ins. Co.,* 15 Wash. (2d) 536, 131 P. (2d) 436.

No additional authorities need be added to those cited by the District Court (R. 56) for the rule of construction requiring language which has acquired a fixed administrative meaning to be given that meaning when used in a statute. "Line of duty" is a thoroughly recognized concept and Congress could not have used the language blindly.

That Congress expressly provided for a more liberal *respondeat superior* test in respect to torts of military personnel than for those of other Government employees was early recognized in several of the most thorough law review articles published on the Tort Claims Act. "The Federal Tort Claims Act—A Statutory Interpretation," Irvin M. Gottlieb, Attorney, Claims Division, Department of Justice, in the Georgetown Law Journal for November, 1946, pages 1, 12; "The Federal Tort Claims Act," Yale Law Journal for February, 1947, pages 534, 539.

CONCLUSION

Since the opinion below has the effect of denying Tort Claims Act recovery in all automobile collision cases where a privately owned automobile is being operated on official travel; since it allows an unfulfilled purpose to take leave at a subsequent time and place to remove ordered travel from the category of official action; and since it fails to recognize

the test prescribed by Congress for acts of military personnel, a Writ of Certiorari should issue and the judgment below be reversed.

Respectfully submitted,

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